IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 23, 2008

IN RE M.P.J. and N.R.J.

Appeal from the Juvenile Court for Carter County
Nos. J-25039 and J-25040 John W. Walton, Judge

No. E2008-00174-COA-R3-PT - FILED AUGUST 27, 2008

The trial court terminated the parental rights of W.G.C. ("Father") to his twin daughters, M.P.J. and N.R.J. ("the Children"), who were two years old at the time of trial. The trial court found, by clear and convincing evidence, that several grounds for terminating Father's parental rights existed and that termination was in the best interest of the Children. Father appeals, challenging the trial court's finding that clear and convincing evidence of grounds to terminate were established at trial. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

C. Brad Sproles, Kingsport, Tennessee, for the appellant, W.G.C.

Robert E. Cooper, Jr., Attorney General and Reporter, and Joshua D. Baker, Assistant Attorney General, General Civil Division, Nashville, Tennessee, for the appellee, State of Tennessee Department of Children's Services.

OPINION

I.

On March 13, 2007, the State of Tennessee Department of Children's Services ("DCS") filed a petition to terminate Father's parental rights to the Children.[1] According to the petition, the Children were placed in the temporary custody of DCS on November 9, 2006, following the entry of an emergency protective custody order. The Children thereafter were adjudicated dependent and neglected on January 25, 2007. As grounds for terminating Father's parental rights, DCS alleged: (1) that Father had abandoned the Children by willfully failing to visit them for the four-month period immediately preceding the filing of the petition; (2) that Father had abandoned the Children by willfully failing to support the Children for the same four-month period; (3) that Father had abandoned the children by wilfully failing to provide a suitable home for them despite the reasonable efforts of DCS to assist Father; and (4) that Father failed to substantially comply with the statement of responsibilities contained in his permanency plan developed by DCS. Finally, DCS alleged that it was in the Children's best interest for Father's parental rights to be terminated. Father was appointed an attorney. The trial court also appointed a guardian ad litem for the Children.

A trial occurred on September 13, 2007, with the first witness being Abby Greene, who is employed by DCS in Child Protective Services. Greene testified that Child Protective Services had received two referrals regarding the Children. The first referral was in April 2006. At that time, Father had just "fled" Georgia and moved to Tennessee with the Children. There were allegations in Georgia that Father had used crack cocaine in front of the Children, and the State of Georgia had an open case on him when he moved. In Tennessee, Father and the Children moved in with Father's sister. Greene conducted an investigation and concluded that Father's sister had a stable home environment. Father's sister indicated that she would assist Father with the Children. Greene closed the case at that time. Even though Greene closed the case, DCS began providing services to assist Father.

The second referral was in August 2006 and involved allegations of neglect and physical abuse. According to Greene, Father and the Children were no longer living with his sister. Rather, they were living in an addition to a small trailer. Father and the Children were living with the Children's biological mother and the biological mother's adult son.[2] Greene was concerned because of the reappearance of the biological mother in the Children's life. Greene stated that drug use was something that "seemed to happen when [the mother] was back in the picture." Support services were provided to both parents. Although the situation went well at first, that changed over time. Greene stated that Father began leaving the Children with his mother because he was afraid the Children's biological mother was using drugs again and she had threatened to take off with the

[1] The petition also successfully sought to terminate the parental rights of the Children's biological mother, who failed to appear at trial. The mother has not appealed the termination of her parental rights and we will limit our discussion to the pertinent facts that have a bearing on Father's case.

[2] The biological mother apparently had a total of seven children. At least one of the children was over 18. Several of the children were being raised by their biological fathers, and at least one was in the custody of the State of Georgia.

Children and return to Georgia. Father advised Greene that he might lose his job; unfortunately, this did occur. Father also lost his home and he and the Children moved into the one bedroom apartment of Father's mother.

Greene contacted the State of Georgia to ascertain if Father had a criminal record. Greene testified that she was informed that Father had been charged with the following crimes:

> Leaving the scene of an accident in 2004, obstruction of officers, terroristic threats and acts, battery in 1997, driving on a revoked [license] and false report of a crime in 1990, [and] carrying a concealed weapon in 1987.

Greene did not know if Father was convicted of all of these crimes, although Father did admit to being convicted of criminal activity in his past.

The next witness was Betty Folkner, a Family Service Worker employed by DCS. Folkner began working on this case when, with the agreement of Father, the Children came into DCS custody in November 2006. Folkner testified that the Children were adjudged dependent and neglected on January 25, 2007, which was over two months after DCS obtained temporary custody. While Folkner was working on the case, Father had a DNA test conducted which established that he was the biological father of the Children.

The petition to terminate parental rights was filed on March 13, 2007. Folkner testified that in the four months preceding the filing of the petition, Father visited with the Children only three times, with the visits lasting 30 to 45 minutes. Father gave various excuses for not visiting more often, such as not having transportation, working a lot of overtime, or he had just lost his job and was homeless. During a portion of the relevant time frame, the Children were living with Father's mother and stepfather. Folkner tried to arrange visitation at DCS, but Father did not want to have visitation there. Instead, he wanted the visitation to take place at his mother's apartment. Folkner explained to Father that DCS would assist him with transportation. However, Father never asked for such assistance even though transportation would have enabled him to visit with the Children more often.

When asked if Father paid any monetary support for the Children, Folkner testified that Father claimed to have given his mother some money, but Father never could provide any proof supporting this claim. Father's mother claimed she never received any support. Father's mother told Folkner that Father spent $60 on the Children at Christmas. His mother rarely saw him after Christmas. Folkner testified that she discussed with Father the importance of paying child support for the Children. Father told her he could not provide support because he did not have a job and was living in a homeless shelter. Folkner stated that during the brief times Father was employed, he did not provide any support.

With regard to Father's housing situation, Folkner testified that she tried to assist him in obtaining public housing, but his criminal record prevented him from being eligible for such housing. After Father's sister "kicked him out" of her house, he told Folkner that he could not find housing because he was unemployed.

Folkner developed a permanency plan to assist Father in regaining custody of the Children. The plan was developed with Father's assistance and he signed the plan. She also discussed with him the criteria and procedures for terminating parental rights.

Folkner explained that the permanency plan required Father to provide a safe, drug-free and stable home for the Children. The plan also required Father to complete DNA testing and then legitimize the Children. While Father did complete the DNA test, he took no steps toward having the Children legitimized. Folkner testified that the plan also required Father to contact the Charlotte Taylor mental health facility in Elizabethton. Father was provided the telephone number of that facility and was required to contact that facility by December 13, 2006, and to schedule a drug and alcohol assessment. Father did not contact this facility by the required date and he did not complete a drug and alcohol assessment until May 2007.

According to the plan, Father was required to undergo periodic random drug testing, but such testing only occurred once because Father otherwise never made himself available. Folkner added that Father tested positive for methamphetamine and opiates when the one drug test occurred.[3] The plan further required Father to clear all legal issues and not to have any further charges brought against him. Since Father was working when the plan was developed, Folkner told him exactly what he needed to do as far as paying his fines and clearing up outstanding legal issues in Georgia. To Folkner's knowledge, Father never paid the outstanding fines in Georgia.

Folkner testified that Father also was required by the plan to obtain and maintain stable employment. While Father was employed when the plan was developed, he lost his job the following month. He obtained part-time or temporary employment approximately four months later. The plan further required Father to obtain stable housing. Folkner explained that since Father was homeless for considerable periods of time, he never has been able to provide a safe and stable place for the Children to live.

Folkner testified that Father was not able to supply the Children with food, clothing, or medical care. Folkner added that it was not until after the petition to terminate was filed that Father began completing some of the requirements that were contained in the permanency plan. Folkner added that, based on the information she had, Father was still living in a boarding house at the time of trial. In short, Folkner testified that Father was not in a position to properly care for the Children.

[3] Father initially claimed he was prescribed medication which would account for why he tested positive for opiates. He later admitted to using cocaine two weeks before the drug test.

With regard to the Children's current situation, Folkner stated they were doing very well in foster care. According to Folkner:

> They're doing real good. . . . [T]he foster mother stays at home with the children. The children are very well behaved. The children have their own beds now. They sleep in twin beds. They attend the library every . . . Thursday, they go to the library for reading time. They take dance classes in Johnson City for social interaction time. . . . They help cook. They help clean the house. They play ball. . . . Their physical health is real good and their interaction as individuals in society is very well behaved.

Folkner added that the foster parents were interested in adopting the Children. Folkner then concluded by stating that it would not be in the Children's best interest for them to be reunited with Father and that Father's parental rights should be terminated.

On cross-examination, Folkner testified that the petition to terminate was filed approximately four months after the permanency plan was developed. Folkner acknowledged that the petition was filed sooner than in other cases. When asked why that was, Folkner stated it was filed so soon because after the permanency plan was developed, Father was doing virtually nothing toward completing that plan and he would not contact her. Folkner stated that, if Father had been making attempts to complete the plan and had remained in contact with her, the petition would not have been filed so quickly.

The final witness was Father. Father testified that he moved into a one-bedroom apartment a week-and-a-half before the September 13, 2007, trial. Father stated that he was hoping to move into a two-bedroom apartment in the near future. Father admitted that his current housing situation was not suitable for the Children, but he claimed that if he was given more time, he would be able to find suitable housing for the Children.

Father stated that he is employed full-time and earns $7.50 per hour. He recited that he had worked as a temporary employee for his current employer for 90 days, then was hired full-time. When questioned about his four-month period of unemployment following his job loss in December 2006, Father explained that he had been working through a temporary employment agency. Three days after he was laid off, the company ran an advertisement for employment. Father called the temporary employment agency and asked "what the deal was." Father was informed that work was available on the day shift, but Father replied that he could not work during the daytime and he declined the employment. At trial Father did not explain why he was unable to work during the day.

Father admitted doing cocaine two weeks before the drug test in August 2007, but denied ever doing methamphetamine. He had no explanation for how methamphetamine was found in his system. Father acknowledged that he still had not paid the outstanding fines in the State of Georgia. He testified that he thought he could have those fines paid off in a month or two. Father claimed that

he visited the Children more often than claimed by his mother. He said that he visited the Children every week in November and then every other week in December. Father claimed that Folkner told him on January 25, 2007, that he could not visit the Children until he had housing, a job, and insurance. Father testified that he gave his mother $400 for child support in December 2006. He stated that he did not get a receipt because "it's family."

In October 2007, the trial court entered an order terminating Father's parental rights. According to the trial court:

> The Court finds that [Father] abandoned the children at issue because [he has] willfully not visited in the four-month period preceding the filing of the Petition to Terminate Parental Rights, or that the visitation is of a token nature. In the four months preceding the filing of the Petition to Terminate Parental Rights, the Court finds that [Father] exercised only token visitation consisting of three visits, of thirty to forty-five minutes each, in the four months preceding the filing of the Petition to Terminate on March 13, 2007, and has not visited with the children at all since then. . . .
>
> The Court finds that [Father's] parental rights to the children listed in the caption should be terminated pursuant to T.C.A. § 36-1-113(g)(1) and T.C.A. § 36-1-102(1)(A)(i) & (D) in that [Father] abandoned these children in that [he has] willfully failed to support or make reasonable payments toward the support of the children for four (4) consecutive months immediately preceding the filing of this petition. In fact, [Father has] not paid any child support whatsoever since these children came into custody. The Court finds that this clearly and convincingly proves that the parental rights of [Father] should be terminated on this ground. . . .
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> The Court finds that the proof shows clearly and convincingly that these children were adjudicated dependent and neglected and placed . . . in DCS custody, pursuant to a petition filed in Juvenile Court, after the children were removed from the custody of [Father]. . . . In the four months after the removal, the Department made reasonable efforts to assist [Father] to establish a suitable home for the children, however, [Father has] made no reasonable efforts to provide a suitable home. The Court finds that the proof shows clearly and convincingly that the only task [Father] complied with is that he submitted to DNA testing, otherwise he failed to complete parenting classes, failed to complete an alcohol and drug assessment in a timely fashion, failed to resolve the pending legal issues in Georgia, failed

to obtain or maintain stable or adequate housing or employment; and failed to maintain contact with [DCS].

The Court finds that there was a history of State involvement in [Father's] home, with Child Protective Services in the home from April of 2006 through removal in November, 2006. Family Support Services were in the home prior to removal as well, with their case being closed out on October 31, 2006. Despite the reasonable efforts made by the State, the Court finds that [Father] did not start parenting classes until May, 2007, and did not finish until July 10, 2007, and is, as of the time of trial, living in a homeless shelter.

The Court finds that the proof is clear and convincing that DCS provided reasonable efforts to [Father] to provide a suitable home for the children in the four months following removal, including but not limited to, that the Family Service Worker and Petitioner Betty Folkner met with and conferred with [Father] on November 15, 2006, at a Child and Family Team Meeting and advised [Father] of the process to get the children back. On November 16, 2006, at a meeting with [Father], he informed DCS and the Petitioner that he was homeless at that time. Petitioner made inquiries and efforts to obtain public housing for [Father], however he was denied due to his prior criminal charges and Petitioner relayed that information on to [Father]. The Court finds that on November 29, 2006, at a Perm Plan Staffing with [Father], Petitioner discussed the tasks on the permanency plan and explained that the successful completion of tasks on the plan would lead to the goal of reunification. The Court finds that [Father] also signed and received a copy of the Criteria and Procedures for Termination of Parental Rights which contains the specific explanation of the grounds for termination of parental rights. . . .

The Court further finds that the Department offered random drug testing to [Father], as when after the January 25, 2007, hearing for ratification of the perm plan, [Father] was asked to come to the DCS office for a drug test; he said he would call for an appointment within the next week, but failed to come by or call for the drug screen. The Court finds that at that time he was living in a boarding house, but that he thereafter failed to call and make any appointment with DCS to discuss progress on the perm plan in regard to housing and employment. . . . DCS further advised [Father] that [the] Foster Care Review Board would be meeting on January 31, 2007, and further provided written notice sent to him at his sister's address, where he

had directed Petitioner to send his mail . . . , but [Father] failed to appear at [the] Foster Care Review Board.

The Court finds that on March 8, 2007, [Father] phoned Petitioner and stated he was homeless and refused to provide a street address or telephone number for where he was living and stated he was living with a man who let him live there in return for working on his house. Petitioner informed [Father] that he had not started on his perm plan except for DNA testing arranged by the state; that he did not have a regular job or means to support the children or suitable housing and explained that a termination petition was going to be filed shortly; reminded him that Petitioner had offered to meet with him in the office and to assist him in completing tasks on the Plan, but that DCS could not pay fines and court costs [Father] owed in the State of Georgia. [Father] admitted he did not have proper housing but denied doing any drugs.

* * *

The Court further finds that [Father] did not complete an Intensive outpatient Drug and Alcohol program until May 3, 2007. He was to have contacted the Charlotte Taylor center by December 15, 2006, for an appointment and provide documentation to Petitioner. The Court finds that the only effort made by [Father] was that he completed the DNA testing and that is all the effort made by him in the four months following removal. . . . The Court therefore finds by clear and convincing evidence that [Father has] failed to make a reasonable effort to provide a suitable home for the children in the four months following removal and terminates [Father's] parental rights on this ground. . . .

The Court finds from the testimony of the witnesses, the exhibits entered into evidence and the record as a whole, that the State has proven by clear and convincing evidence, that [Father has] not substantially complied with the permanency plan established in this matter. That the permanency plan was ratified by the Court and met the requirements of T.C.A. § 37-2-403(a)(2). The evidence shows that [Father] was to complete DNA testing by April 1, 2007, he was to complete an alcohol and drug assessment and was to contact [the] Charlotte Taylor Center for an appointment and was to provide documentation to your Petitioner that he had done so, all by December 15, 2006; he was to submit to random drug screens; he was to clear and resolve all legal issues and obtain no new charges; he was

> to obtain and maintain stable and adequate housing in order to care for his children. [Father] completed the DNA testing and that is all he completed on the Plan. [Father] failed to complete an Intensive outpatient Drug and Alcohol program until May 3, 2007, and failed to contact the Charlotte Taylor center by December 15, 2006, for an appointment and failed to provide said documentation to Petitioner in a timely fashion. . . . The Court therefore finds by clear and convincing evidence that [Father] . . . failed to substantially comply with the Permanency Plan approved by the Court . . . and therefore the Court does hereby terminate [Father's] parental rights on this ground. [Father has] not demonstrated that [he] can properly care for the children, [has] not demonstrated that [he] understands the skills that are necessary to parent children, and [has] demonstrated a lack of concern for the children. Further, [Father has] not maintained consistent contact with the children or the Department of Children's Services.

After determining that grounds for termination had been established by clear and convincing evidence, the trial court next considered whether termination was in the Children's best interest. After reiterating the pertinent facts set forth above, the trial court determined that it had been proven, clearly and convincingly, that termination was in the Children's best interest. Father appeals and challenges the sufficiency of the evidence with respect to each of the four grounds upon which the trial court terminated his parental rights. We will discuss each ground in turn.

II.

In cases involving the termination of parental rights, our duty on factual matters is to "determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence." ***In re F.R.R., III***, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. ***Id.***; Tenn. R. App. P. 13(d). In weighing the preponderance of the evidence, great weight is accorded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See* ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002). Questions of law are reviewed *de novo* with no presumption of correctness. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 744-45 (Tenn. 2002).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor. Thus, trial courts are in a unique position to evaluate witness credibility. *See* ***State v. Pruett***, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See* ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999), ***Humphrey v. David Witherspoon, Inc.***, 734 S.W.2d 315, 315-16 (Tenn. 1987).

Parents have a fundamental right to the care, custody, and control of their children. ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); ***O'Daniel v. Messier***, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995) (*rev'd on other grounds*, ***In re Swanson***, 2 S.W.3d 180 (Tenn. 1999)); ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re M.J.B.***, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting T.C.A. § 36-1-113(l)(l)). "Few consequences of judicial action are so grave as the severance of natural family ties." ***M.L.B. v. S.L.J.***, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting ***Santosky v. Kramer***, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See* ***Blair v. Badenhope***, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. ***In re Drinnon***, 776 S.W.2d at 97. T.C.A. § 36-1-113 (Supp. 2007) governs termination of parental rights in this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interests of the child." T.C.A. § 36-1-113(c); ***In re F.R.R., III***, 193 S.W.3d at 530. Both of these elements must be established by clear and convincing evidence. *See* T.C.A. § 36-1-113(c)(1); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. ***In re C.W.W.***, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000) (*abrogated on other grounds*, ***In re Audrey S.***, 182 S.W.3d 838 (Tenn. Ct. App. 2005)).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. ***In re C.W.W.***, 37 S.W.3d at 474; ***In re M.W.A., Jr.***, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, ***State v. Demarr***, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. ***In re Valentine***, 79 S.W.3d at 546; ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re J.J.C.,*** 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. ***In re A.D.A.***, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); ***Ray v. Ray***, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); ***In re C.W.W.***, 37 S.W.3d at 474.

III.

In the present case, Father's parental rights were terminated pursuant to T.C.A. § 36-1-113(g)(1) & (2) (Supp. 2007). These statutory provisions provide as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred;
>
> (2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4[.]

The statutory provision referenced in the preceding – T.C.A. § 36-1-102 (2005) – provides, in relevant part, as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:
>
> (i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child;
>
> (ii) The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a

> suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date….

For purposes of subdivision (1) of T.C.A. § 36-1-102, "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means "the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child [ ] . . . ." T.C.A. § 36-1-102(1)(D) (2005). "Token support" means that "under the circumstances of the individual case," the support is "insignificant given the parent's means." T.C.A. § 36-1-102(1)(B) (2005). Simply proving that a parent did not support a child is not sufficient to carry this burden. ***In re M.J.B.***, 140 S.W.3d at 655. A parent's failure to support his or her child because he or she is financially unable to do so does not constitute a willful failure to support. *E.g.,* ***O'Daniel***, 905 S.W.2d at 188; ***In re Adoption of Kleshinski***, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *18 (Tenn. Ct. App. M.S., filed May 4, 2005). "Willful" failure to support a child occurs when a person is aware of his or her duty to support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. ***In re M.J.B.***, 140 S.W.3d at 654. The requirement that the failure to support be "willful" is both a statutory and a constitutional requirement. *See* ***In re Swanson***, 2 S.W.3d 180, 188 (Tenn. 1999).

We first will address the trial court's ruling that Father willfully abandoned the Children by failing to support them. The trial court found that Father failed to pay any child support during the four-month period immediately preceding the filing of the petition. In making this determination, the trial court apparently gave no weight to Father's unsupported *claim* that he paid $400 to his mother in December 2006 – a claim denied by his mother. Given Folkner's testimony and the fact that Father was unable to provide any documentation supporting his claim of payment and his mother's denial of same, we cannot conclude that the facts preponderate against the trial court's conclusion.

Simply because Father was unemployed does not necessarily mean that his lack of paying child support was willful. *Cf.* ***Dep't of Children's Servs. v. D.A.B.***, No. E2006-01490-COA-R3-PT, 2006 WL 3694449, at *13 (Tenn. Ct. App. E.S., filed December 15, 2006), *no appl. perm. appeal filed* (accepting the State's concession on appeal that "because the record establishes that [Father] was involuntarily unemployed during the relevant four-month period, a wilful failure to support will . . . not be pursued on appeal."). The question then becomes whether Father's unemployment in this case was involuntary. In light of Father's testimony that he was offered employment and he declined that employment, we conclude that his unemployment was voluntary. Had he accepted the employment offer, he would have had an income and could have made at least some support payments. Therefore, we affirm the trial court's determination that Father willfully failed to pay child support for the four-month period immediately preceding the filing of the petition.

The next issue is whether the trial court erred when it determined that Father had abandoned the Children by willfully failing to visit them or engaging in only token visitation for the four-month period immediately preceding the filing of the petition. As with the previous issue, this issue is dependent upon the credibility of Father's testimony. The trial court found that during the relevant four-month period, Father only visited the Children three times and that these visits lasted 30 to 45 minutes each. This finding is consistent with Folkner's testimony and the facts do not preponderate against this finding. As discussed previously, DCS offered to provide transportation to Father so he could visit the Children, but Father never took DCS up on this offer. We also note that Folkner testified that she informed Father that visits could be arranged on the premises of DCS, but Father refused because he wanted the visits to occur at his mother's apartment. In light of the foregoing, we cannot conclude that the trial court erred when it determined that DCS had proven, clearly and convincingly, that Father had willfully failed to visit the Children or only engaged in token visitation for the four-month period immediately preceding the filing of the petition.

The third issue is whether the trial court erred when it determined that Father had abandoned the Children as defined in T.C.A. § 36-1-102(1)(A)(ii), *supra*. The facts clearly show that the Children were removed from Father's custody and care on November 9, 2006, and were later adjudged to be dependent and neglected. During most of the four-month period immediately preceding the filing of the petition, Father was homeless or living at a homeless shelter. Father also was unemployed, even though he had been offered employment which, as previously noted, he declined. There is no evidence in the record to show that Father made any reasonable effort whatsoever to provide a suitable home for the Children during the relevant four-month period, notwithstanding the reasonable efforts made by DCS. Given that Father still did not have a suitable home for the Children on the date of trial, it certainly was unlikely that Father would be able to provide a suitable home in the near future. We conclude that facts, as found by the trial court, establish clearly and convincingly that Father had abandoned the Children as that term is defined in T.C.A. § 36-1-102(1)(A)(ii).

The last issue raised by Father is whether the trial court erred when it determined that he failed to substantially comply with the statement of responsibilities contained in his permanency plan. Between the time the permanency plan was developed and the time the petition to terminate was filed, Father essentially did nothing toward completing the requirements of the plan, such as finding and maintaining stable employment, finding suitable housing for the Children, remaining drug-free, and resolving the outstanding legal issues in Georgia. It was not until at least one month after the petition to terminate was filed that Father actually began to comply with some of the requirements of the plan. By the time of trial, Father still did not have suitable housing for the Children and had not demonstrated that he would be able to properly care for the Children. Approximately one month before trial, Father tested positive for cocaine and methamphetamine. Father was voluntarily unemployed for approximately four of the first five months after the permanency plan was developed. The legal issues in Georgia had not been taken care of by the time of trial. Accordingly, we conclude that the trial court did not err when it concluded that DCS has established, clearly and convincingly, that Father failed to substantially comply with the statement of responsibilities contained in the permanency plan.

On appeal, Father does not address the trial court's conclusion that it was in the best interest of the Children for his parental rights to be terminated. Father claims that because the trial court erred when it concluded that grounds had been established by the requisite proof, there was no need to "attack the best interest determination made by the [trial court]." Notwithstanding Father's position taken on appeal, we will, out of an abundance of caution, review the trial court's best interest analysis. The relevant statutory provisions is T.C.A. § 36-1-113(i) (Supp. 2007), which provides as follows:

> (i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

T.C.A. § 36-1-113(i). When considering the child's best interest, the court must take the child's, rather than the parent's, perspective. ***White v. Moody***, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004).

The facts establish that Father has not made an adjustment of circumstance such that it would be safe for the Children to return to his care. Indeed, by the time of trial Father still had failed to secure housing adequate for the Children. Although he stated that he just needed more time, over 10 months had elapsed from the date the Children were removed from his care until the date of trial. Father's visitation with the Children was virtually nonexistent and he failed to provide any financial support. The Children have adjusted quite well to living with the foster parents, who are interested in adopting the Children. Father did not stay drug-free and, in fact, tested positive for opiates and amphetamine approximately one month before trial. After reviewing the applicable factors in light of the facts discussed at length above, we readily conclude that the evidence does not preponderate against the trial court's conclusion, made by clear and convincing evidence, that termination of Father's parental rights is in the children's best interest.

IV.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, W.G.C. This case is remanded to the trial court for enforcement of the court's judgment and for the collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE